IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.108 OF 2003

...

Shri Mahavir Prasad Mansinghka
and Anr. ...Petitioners

v/s.

Shri Mahendrakumar Mansingka
and Ors. ...Respondents

...

Mr.H.J. Thakker, Sr.counsel i/b Bhaishankar Kanga & Girdharilal for Petitioners.

Mr.F.D'vitre with Mr.J.P. Sen i/b Federal and Rashmikant for the Respondents.

...

CORAM: D.K.DESHMUKH, J.

DATED: 28TH FEBRUARY,2005

JUDGMENT:

1. By this petition filed under Section 34 of the Arbitration and Conciliation Act the Petitioners challenge the award dated 25th November, 2002 made by the Arbitral Tribunal. The facts that are relevant for deciding this petition are as under:

2. The Petitioner No.1 and his four sons i.e. Petitioner No.2 and three Respondents as members of the family entered into family arrangement dated 14-11-1994. The said family arrangement was titled as "Memorandum of Understanding"-MOU, whereby several family properties, moveable and immoveable, family business etc. were distributed and or transferred between the parties. "MP Mansingka Charities is the Public Trust registered under the Bombay Public Trust Act, 1950. That Public Trust had three trustees (i) the Petitioner No.1, who was the Chairman; (ii) the Respondent No.1 Mahendrakumar, who was the Managing

Trustee and (iii) Shri O.P. Gupta, who was the trustee. In the MOU a clause was included in relation to this Public Trust. The entire dispute in the present case relates to this clause. It was clause No.16. It is reproduced below.

> "The Public Charity Trust will be controlled and managed by Shri Mahavir Prasad Mansingka, and Shri Mahendra Kumar Mansingka shall resign as Managing Trustee. Shri Narendra Kumar Mansingka, Virendra Kumar Mansingka and Ravindra Kumar Mansingka, will be co-opted as Additional Trustees. It is however, agreed that the parties, if they so desire, may from their independent Public Charity Trusts with the objects similar to the present Trust. On such trust being formed and request made by such Trust for donation in its corpus the present Trust will donate 1/5th of its present corpus to such newly formed trust to be managed by party concerned independently. In such an event the party forming independent trust will resign from the present trust as a Trustee."

3. Clause 20 of the MOU is the Arbitration clause in relation to disputes and differences arising out of the MOU. The trustees of the said Public Trust by Resolution dated 25th November, 1994 appointed the Petitioner No.2 and the Respondents Nos. 2 & 3 as trustees. The Respondent No.1 has submitted his resignation as the Managing Trustee of the said Trust. That resignation was accepted in the meeting dated 25-11-1994. Proceedings were taken up under Section 22 of the Bombay Public Trust Act for recording the names of Petitioner No.2 and the Respondents Nos. 2 & 3 as the trustees of the Public Trust. In those proceedings the Respondent No.1 appeared and opposed the recording of the change. Ultimately the change appointing the Petitioner No.2 and the Respondents Nos. 2 & 3 as trustees of the said Trust was duly registered. The Respondent No.1 in the meantime got the Public Trust registered by name "Shree Charities" and that Public Trust wrote a letter dated 28th August, 1995 to the Petitioners and the Respondents Nos. 2 & 3 calling upon them to make M.P. Mansingka Trust to donate

1/5th of its corpus to the newly formed Trust i.e. Shree Charities by passing necessary resolution of the M.P. Mansingka Charity Trust (herein after referred to as the "Trust"). According to the Respondent No.1 nothing was done by the Trust or by the Petitioner No.1 and therefore, he invoked the arbitration clause. Ultimately the arbitral tribunal consisting of three persons was constituted. The parties appeared before the arbitral tribunal. The Respondent No.1 was the claimant. He filed his statement of claim, which was opposed mainly by the Petitioner No.1. The parties also led oral and documentary evidence and on the basis of the evidence available on record the arbitral tribunal passed the award directing the Petitioners and the Respondents Nos. 2 & 3 to pay to the Respondent No.1 an amount of Rs.3.57 crore with interest at the rate of 12% p.a. from the date of reference till realisation. The Respondent No.1 was to deposit that amount with his Trust. The award gives an option to the Petitioners and the Respondents Nos. 2 & 3 to procure that amount from the Trust. It is this award which is challenged in the present proceedings.

4. The learned Counsel appearing for the Petitioners submits that property of the registered Public Trust cannot be dealt with as if it was the personal property of the Mansingka family and cannot form a part of the family settlement dividing the properties of the family amongst the members of the family. He submits that clause 16 which provides for donation of the corpus of the registered Public Trust amongst the members of Mansingka family is contrary to the provisions of Section 51 of the Indian Trust Act. It is submitted that a promise for dividing 1/5th of the corpus of the trust could have been made only by resolution passed by the Board of Trustees. Such promise cannot be made only by one of the trustee in a private family arrangement. In short, it is submitted that clause 16 of the MOU is unenforceable. It is submitted that property of the Public Trust can be used only for the benefit of the Public Trust itself. That property cannot be disposed of or used for giving prestige in society to the members of the family. It is submitted that clause 16 does not cast any obligation on the Petitioners to donate any amount to Shree Charities, and therefore the arbitral tribunal could not have made an award directing the

Petitioners and the Respondents Nos. 2 & 3 to pay the amount to the Respondent No.1. It is further submitted that there was no question of the arbitrators granting specific performance of the obligation under clause 16 of the MOU, because clause 16 does not cast any personal obligation on the Petitioners and the Respondents Nos. 2 & 3. What has been awarded by the arbitral tribunal is damages for alleged breach of obligation by the Petitioners and the Respondents Nos. 2 & 3. However, while arriving at the amount of damages the arbitral tribunal has taken into consideration the value of the property which was to be donated by the trust to Shree Charities. Though the arbitral tribunal itself has said that all that the Petitioners and the Respondents Nos. 2 & 3 could have done was to place the matter before the Board of Trustees. It is clear that the Board of Trustees could have either accepted the suggestion or not accepted the suggestion. But the arbitral tribunals has not taken into consideration this situation while arriving at the amount of damages. It is submitted that the award is liable to be set aside also because admittedly the arbitrators signed and made the award which was incomplete. Admittedly,

the date on which the award was signed by the three arbitrators, one page from the award was missing. According to the Petitioners, therefore, the conduct of the arbitrators of supplying that missing page subsequently is illegal, because after making and signing the award the arbitrators have become functious officio and they could not have supplied the missing page of the award subsequently.

5. On the other hand, on behalf of the Respondent No.1 the award is supported. It is claimed that the Petitioners have not been able to show that clause 16 is contrary to any law and therefore according to the Respondent No.1, clause 16 is enforceable. It is submitted that the Petitioner No.1 was the trustee of the trust and in his capacity as a trustee he has undertaken an obligation to take steps for donating 1/5th of the corpus of the Trust to Shree Charities. But after undertaking that obligation he took steps to prevent that event taking place and therefore the arbitrators were fully justified in enforcing the personal obligation taken up by the Petitioner No.1 against him. It is further submitted that the arbitrators have made a detailed award. They have given reasons for all the

findings that have been recorded by them and the findings that have been recorded by the arbitral tribunal are findings which are possible to be recorded on the basis of the material that is available on record and therefore this court will not be justified in disturbing those findings in its jurisdiction under Section 34 of the Arbitration and Conciliation Act. It is further submitted that though it is true that one page of the award was missing on the date on which the award was signed by the members of the arbitral tribunal, the missing page was supplied within a period of 30 days of the award, which was the permissible course of action under Section 33 of the Arbitration Act. It is further submitted that the arbitral tribunal supplied the missing page with the consent of the parties and therefore for that reason the award cannot be said to be vitiated. It was also urged that if the court finds that this is the only reason for setting aside the award, the Court can exercise its power under sub-section (4) of Section 34 of the Arbitration Act and direct the arbitral tribunal to resume the proceedings for that portion.

6. Now, perusal of the operative part of the award shows that the Petitioners and the Respondents Nos. 2 & 3 have been directed to pay an amount of Rs.3.57 crores with interest at the rate of 12% p.a. from the date of reference till the date of realisation to the Respondent No.1, and this award has been made because of clause 16 of the MOU. Perusal of clause 16 reveals following significant features:

(i) According to clause 16, the trust was controlled by the Petitioner No.1 and the Respondent No.2

(ii) The Petitioner No.2 and the Respondents Nos. 2 & 3 were to be co.opted as additional trustees.

(iii) Petitioners Nos. 1 & 2 and the Respondents Nos. 1,2 and 3 were free to form independent public trust with the object similar to the trust.

(iv) On formation of such trust, such trust can make an application to the trust for donation of 1/5th of its present corpus to the newly formed trust.

(v) All the parties namely the Petitioners and the

Respondents, who desired to constitute independent trust had to resign from the trust.

7. The record reveals that the first assumption of clause 16 that the trust was controlled and managed by only the Petitioner No.1 and the Respondent No.1 is wrong. There were three trustees namely the Petitioner No.1, Respondent No.1 and one Mr.O.P.Gupta. Second significant aspect which is revealed from the record is that though the Respondent No.1 had agreed that the Petitioner No.2 and the Respondents Nos. 2 & 3 would be co.opted as trustees of the trust, he himself opposed the proceedings that were taken up for recording of their names as trustees of the trust. The Respondent No.1 as a trustee of Shree Charities made an application for donation to the trust 1/5th of its corpus on 28-8-1995 and according to the Respondent No.1 failure of the trust to make the donation gave him a cause of action for bringing action against the Petitioners and the Respondents Nos. 2 & 3 for breach of promise. Perusal of the award of the arbitral tribunal also shows that the arbitral tribunal has held that breach of promise was committed apart from Petitioner No.1, by the

Petitioner No.2 and the Respondents Nos. 2 & 3 and therefore the award for payment of Rs.3.57 crores has been made against all of them. However, though the Respondent No.1 was contending that apart from the Petitioner No.1, the Petitioner No.2 and the Respondents Nos. 2 & 3 also have failed to perform their obligation, and their obligation was as trustees of the trust to donate 1/5th of the corpus of the trust to Shree Charities. The arbitration clause was invoked in the year 1997 and the arbitration petition No.38 of 1997 was filed. However, record reveals that the Respondent No.1 opposed the application made for condonation of delay in filing the change report. That application was granted by the authorities under the Bombay Public Trust Act. That order was challenged by the Respondent No.1 before the Division Bench of this Court by filing Writ Petition No.1535 of 1997. Which was dismissed on 7th October, 1997. The Special Leave Petition submitted to the Supreme Court against that order by the Respondent No.1 has been dismissed by the Supreme Court on 24-1-2000. Thereafter, the Respondent No.1 also opposed the application filed under Section 22 of the Bombay Public Trust Act for recording of the change, namely

appointment of the Petitioner No.2 and the Respondents Nos. 2 & 3 as trustees that was granted by order dated 14-1-1998. That order was challenged in appeal by the Respondent No.1. That appeal was dismissed by order dated 31-7-1999. Thus, it is clear that the Respondent No.1 was opposing appointment of the Petitioner No.2 and the Respondents Nos.2 & 3 as trustees of the trust and still he claims that the Petitioner No.2 and the Respondents Nos. 2 & 3 should have accepted the request of Shree Charities for donation of 1/5th corpus of the trust and because they have committed breach of that obligation, they are liable to pay along with the Petitioner No.1 the aforesaid amount. In my opinion, the conduct of the Respondent No.1 of contesting the proceeding taken up for recording the names of the Petitioner No.2 and Respondents Nos. 2 & 3 as trustees of the trust disentile the Respondent No.1 to claim enforcement of obligation against them under clause 16 of the MOU.

8. By clause 16 what was to be donated by the Trust was 1/5th of its corpus. The term corpus is not defined by the Bombay Public Trust Act. Dictionary meaning of the term "Corpus" is, capital sum

originally lent or invested. Thus it means the principal funds or property held by the trust and will also include all assets of the trust. The corpus would include original properties with which the trust is founded. Acquisition thereto under any contribution received by the trust with the specific directions that they should form part of the corpus. In short, any amount which represents the capital of the trust would constitute its corpus. The immovable property of the trust also forms the part of the corpus of the trust. The trust is a Public Trust. In the case of private trust, the beneficiaries are specific individuals. In the case of public trust, beneficiaries are general public or a larger portion of general public. In the case of private trust, beneficiaries are persons who are ascertained or are capable of being ascertained. The trust funds or the property of the public trust can be used by the trustees for the purpose of trust, and therefore, it is the statutory duty of the trustees to utilise the property of the trust in such a manner that it will benefit the beneficaries of the trust. As observed above, beneficiaries of the public trust is the public generally. However, the arbitrators have found that the purpose of

clause 16 was not the benefits of the public generally, but to give the parties to the MOU an opportunity to have equal prestige, standing and power. Relevant observations are to be found in para 28 of the award, which read as under:-

> "We have no hesitation in accepting the submissions of Mr.Thacker that the property of a charitable trust cannot be equated with the private or personal property. It is however, well known that control of a trust gives to the trustees some prestige and standing in the society and, indirectly, some power. These are the natural consequence of being trustee of a trust, particularly a large trust. This consequence is in built and cannot be prevented but can only be controlled. what the Memorandum of Understanding seeks to do is to give to all the parties an opportunity to have equal prestige, standing and power. The properties obviously did not form part of the family assets, but assets and properties of the M.P. Mansingka Trust were admittedly in

absolute control and management of the Mansingka family. This is what is stated in the recital F. What is sought to be brought about is the sharing of this control and management through different trust. The other parts of the Memorandum of Understanding also support this notion of control and management of the trust by an individual e.g. recital (aa) and clause 16 itself.

9. In my opinion, if this is the object behind clause 16 of the MOU, it will be contrary to the very object of the Bombay Public Trust Act. The trustees of the Charitable Trust cannot agree to dispose of the property of the Public Trust to enhance the prestige and standing in the society of member of the family of the trustees. In my opinion, therefore, if clause 16 is read to cast obligation on the Public Trust or its trustees to donate 1/5th of its corpus so that it can be used by the Respondent No.1 to enhance his prestige, standing or power, then it will be against the public good to enforce Clause 16.

10. Perusal of clause 16 shows that if that clause is literally read, it casts obligation on the trust to donate 1/5th of its corpus. But the trust is not a party to the MOU. All the trustees of the trust are also not parties to the MOU. They were also not before the arbitrators. Therefore, the obligation could not have been enforced against the public trust. The arbitral tribunal, however, has held that clause 16 casts a personal obligation on persons who were parties to clause 16 and were also trustees of the trust to take steps so that the Board of trustees of the trust could have passed the resolution for donation of 1/5th of its corpus to Shree Charities. It is therefore obvious that all that the Petitioners and the Respondents Nos. 2 & 3 could have done was to place the request made by the Respondent No.1 on behalf of Shree Charities before the Board of trustees of the Trust, then it was for the Board of trustees either to accept the request or to reject it. The arbitrators have not held that clause 16 casts a duty on the Petitioners and the Respondents Nos. 2 & 3 to exercise their rights of vote as trustees of the trust in a particular manner so as to grant the request made by the Respondent

No.1. Therefore, it appears that even according to the arbitral tribunal despite clause 16 the Petitioners and the Respondents Nos. 2 & 3 were free to cast their votes as trustees in the meeting of the Board of trustees according to their conscious without being bound to vote in a particular way because of clause 16. Therefore, it was possible that even after the request of the Respondent No.1 is placed before the Board of trustees it being rejected. But the arbitral tribunal has not taken this contingency into consideration while arriving at the amount of damages that have been awarded. If at all damages could have been awarded against the Petitioners and the Respondents Nos. 2 & 3 for breach of obligation committed by them of not placing the request before the meeting of the Board of trustees of the trust, and for breach of that obligation by no stretch of imagination as damages the value of the 1/5th of the corpus could have been awarded, ignoring the possibility that the Board of trustees could have rejected the request. In my opinion, this is a major flaw in the award and for this reason alone the award is liable to be set aside.

11. It is further to be seen here that though before me arguments at length were advanced on the question whether the arbitral tribunal could have granted specific performance of clause 16, in view of the conduct of the Respondent No.1 of opposing the appointment of the Petitioner No.2 and the Respondents Nos. 2 & 3 as trustees of the trust. In my opinion, it is clear from the award that the arbitral tribunal has not granted specific performance of clause 16 and it could not have been granted because if specific performance had to be granted, the decree will have to be passed against the trust because clause 16 casts obligation to donate on the trust.

12. As I have come to the conclusion that clause 16 itself was unenforceable and the award is vitiated for more reasons than one, I am not going into the question whether the conduct of the arbitral tribunal of supplying the one page of the award subsequently is as per the law or against the law, though I find considerable substance in the submissions of the learned counsel appearing for the Petitioners that even assuming that the arbitral

tribunal could have supplied the missing page in view of the provisions of Section 33, the arbitrators could not have done so merely by forwarding that page to the parties. Even for doing that under Section 33, it was necessary for the arbitrators to take up proceedings under Section 33 for that purpose.

13. For all these reasons, in my opinion, the award is liable to set aside. It is accordingly set aside. The Respondent No.1 is directed to pay costs of this petition to the Petitioners, as incurred by them.

...